87-821

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PITTSTON COAL GROUP, BARNES & TUCKER COMPANY, ISLAND CREEK COAL COMPANY, CONSOLIDATION COAL COMPANY, OLD REPUBLIC INSURANCE COMPANY, PENNSYLVANIA NATIONAL INSURANCE GROUP,

Petitioners,

v.

JAMES SEBBEN, JOHN COSSOLOTTO, BRUNO LENZINI, CHARLES TONELLI, WILLIAM BROCK, III, SECRETARY UNITED STATES DEPARTMENT OF LABOR, STEVEN BREESKIN, DEPUTY COMMISSIONER, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315 James Sebben; John Cossolotto; Bruno Lenzini; and Charles Tonelli, on behalf of themselves and all others similarly situated, *Appellants,* v. William E. Brock, III; United States Secretary of Labor; United States Department of Labor; and Steven Breeskin, Acting Deputy Commissioner, U.S. Department of Labor, Division of Coal Mine Workers' Compensation, *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

Submitted: October 16, 1986
Filed: March 25, 1987

Before HEANEY and ROSS, Circuit Judges, and LARSON,* Senior District Judge.

HEANEY, Circuit Judge.

The appellants, James Sebben, John Cossolotto, and Charles Tonelli, are claimants and representatives of a group of claimants seeking benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-42 (1982 & Supp. III 1985) (codified as amended in 1972, 1978, 1981 and 1984) (the BLBA). In the district court, they sought certification of a class and a writ of mandamus under 28 U.S.C. § 1361 to compel the Department of Labor to consider or reconsider the claims of the proposed class under 30 U.S.C. § 902(f)(2) (1982) as interpreted by *Coughlan* v. *Director, Office of Workers' Compensation Programs,* 757 F.2d 966 (8th Cir. 1985). The district court denied the application for the writ and dismissed the claim without certifying the class.[1] It held that *Coughlan* was not applicable to claims previously denied by the Department of Labor and not timely pursued on appeal. It further held that it was without jurisdiction because the BLBA conferred exclusive jurisdiction upon the circuit courts of appeals to review administrative decisions under the BLBA.

On appeal, the Secretary of Labor (Secretary) concedes that the proper standard for review of the appellants' BLBA claims is articulated in *Coughlan.* The Secretary has also agreed to apply *Coughlan* in all pending cases in the Eighth Circuit.

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*The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

1. Because the district court never certified the class, we refer to the group of claimants who intended to join it as the "class," with the recognition that it is not a class within the meaning of Fed. R. Civ. P. 23. *See Baxter* v. *Palmigiano,* 425 U.S. 308, 310-11 n.1 (1976).

On remand, the district court shall define the class and determine which appellants could appropriately represent it. If some or all cannot, application may be made to the district court for designation of the appropriate class representatives. We note that one of the appellants named in this appeal, Bruno Lenzini, has been awarded benefits under the BLBA. *Lenzini* v. *Director, Officer of Workers' Compensation Programs,* No. 86-1001, slip op. (8th Cir. May 8, 1986). Lenzini therefore would not be an appropriate class representative.

In *Coughlan,* this Court considered claims of miners and their survivors who argued that the miners had become totally disabled due to black lung disease (pneumoconiosis) under the BLBA. The presence of pneumoconiosis in *Coughlan* was proved by a positive chest x-ray of the miner. We held that a positive x-ray was sufficient to create a rebuttable presumption of pneumoconiosis under 20 C.F.R. § 410.490 (1986) (known as the "interim" regulation). We reasoned that even though the presumption of pneumoconiosis in section 410.490 originally only applied to claims made prior to July 1, 1973, a 1977 amendment to the BLBA, 30 U.S.C. § 902(f)(2) (1982), revived the presumption and made it applicable to the claims presented. *Coughlan,* 757 F.2d at 967-68.

The appellants allege that they and the "class" all filed claims on or before March 31, 1980, thus entitling them to the section 410.490 presumption accorded to the claimants in *Coughlan.*[2] They further allege that they all submitted positive x-rays as evidence of total disability but were not afforded the section 410.490 presumption of disability mandated by *Coughlan.*

The Secretary contends that, even assuming the substantive validity of the "class" members' claims, the district court properly dismissed the action because: (1) the district court lacked jurisdiction; (2) the appellants and the class members failed to exhaust their administrative remedies; and (3) many of the potential class members failed to file timely administrative and judicial appeals and thus are jurisdictionally barred from seeking review at this time.

I. JURISDICTION OF THE DISTRICT COURT.

At the outset, we accept the proposition that where Congress establishes a special statutory review procedure for administrative actions, that procedure is generally the exclusive means of review for those actions. *Louisville and Nashville R. Co.* v.

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2. In order for the claimants to be accorded the presumption contained in section 410.490 (b), 30 U.S.C. § 902 (f)(2) required that they file a claim on or before the effective date of 20 C.F.R. Part 718 (1986), which would mean before April 1, 1980. *See* 20 C.F.R. § 718.1(b).

Donovan, 713 F.2d 1243, 1246 (6th Cir. 1983); *see also Heckler* v. *Ringer*, 466 U.S. 602, 616-17 (1984) (refusing to consider whether mandamus jurisdiction is barred by 42 U.S.C. § 405(h) of the Social Security Act). Furthermore, the unavailability of simultaneous review of administrative actions in both the district court and the circuit court of appeals is strongly presumed. *Louisville & Nashville R. Co.*, 713 F.2d at 1246. In "narrow circumstances," however, "some residuum of federal question subject matter jurisdiction may exist in the district court, although apparently otherwise precluded by a comprehensive statutory review scheme." *Id.* at 1246. That residuum may permit district courts in the proper circumstances to exercise mandamus jurisdiction over the agency under the BLBA. *Id.*

Before a district court can issue a writ of mandamus under section 1361 and exercise jurisdiction outside of that provided in the BLBA, the claimant must show either "patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review." *Id.* (citing *Nader* v. *Volpe*, 466 F.2d 261, 265-66 (D.C. Cir. 1972)). In addition, the claimant must show that the agency, over which jurisdiction is exercised, has a clear nondiscretionary duty to act. *Heckler* v. *Ringer*, 466 U.S. at 616-17.

The circumstances of this case reveal that review of claims under the BLBA cannot remedy the infringement on the substantial rights of the "class" members. The Department of Labor has agreed to follow *Coughlan* in all cases pending in the Eighth Circuit after the date of that decision. The agency, however, refuses to reopen the claims of the "class" members here which were adjudicated prior to *Coughlan* and in which the claimant failed either to appeal to the Benefits Review Board (BRB) within thirty days after an initial determination, *see* 30 U.S.C. § 932(a) (1982) (incorporating 33 U.S.C. § 921(a) (1982) of the Longshore and Harbor Workers' Act), or within sixty days to the court of appeals after a final agency decision. *See id.* (incorporating 33 U.S.C. § 921(c) (1982) of the Longshore and Harbor Workers Act). Therefore, according to the Secretary, these

claimants should not be afforded the benefit of the *Coughlan* decision because the BLBA provides the exclusive means of review of the class members' claims, and the periods of limitation in sections 921(a) and (c) bar their claims.

These claimants, however, deserve to have their claims heard. In the past, claimants under the BLBA have encountered enormous frustration in the processing of their claims due to administrative delays and determinations under improper standards. Congress has repeatedly attempted to ease the burden of proof of disability and to expedite black lung claims. More specifically, the BLBA's legislative history reveals Congress twice, in 1972 and 1977, instructed that then-pending or denied claims be reopened in order that claims could be readjudicated under what Congress believed to be more fair standards of disability.

The BLBA as established in 1969 (originally titled the Federal Coal Mine Health and Safety Act of 1969) provided benefits to coal miners who were totally disabled due to pneumoconiosis. Pub. L. No. 91-173, 83 Stat. 792 (codified as amended at 30 U.S.C. §§ 901-41 (1982 & Supp. III 1985)). The 1969 Act was divided into three sections: Part A (sections 901-02) provided general findings and definitions; Part B (sections 921-25) applied to claims filed before December 31, 1972, administered by the Secretary of Health, Education and Welfare; Part C (sections 931-41) applied to claims made after December 31, 1972.[3]

To qualify for benefits, the 1969 Act required a claimant to establish that the miner (1) had pneumoconiosis, (2) that arose out of coal mine employment, (3) causing total disability or death. 30 U.S.C. § 902 (1976) (codified as amended in 1972. To assist claimants in meeting these requirements, the 1969 Act provided an irrebuttable presumption, *see* 30 U.S.C.

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3. Part C allowed for alternative compensation either under a state statute meeting federal requirements or, absent such a statute, under a federal compensation system administered by the Secretary of Labor. 30 U.S.C. §§ 931-45 (1982). Under the federal program, the Department of Labor would attempt to locate a responsible mine operator who would make payments for the miner. If no such operator could be identified, payments would be made from federal funds. 30 U.S.C. §§ 932, 934.

§ 921(c)(3), and a rebuttable presumption. The rebuttable presumption presumed either that a disabled, 30 U.S.C. § 921(c)(1), or a deceased, 30 U.S.C. § 921(c)(2), miner's pneumoconiosis arose out of coal mine employment if the miner had worked ten years or more in an underground mine.

Claimants under the 1969 Act, however, encountered difficulties in proving total disability under the rebuttable presumption. X-rays initially read as positive were reread as negative by government-retained radiologists ("B-readers"); the standard of disability in the 1969 Act—requiring a miner to be unable to do any substantial work, 30 U.S.C. § 902(f)—proved difficult to meet; and deceased miners' spouses lacked sufficient evidence to prove the miners died from pneumoconiosis. *See* J. S. Lapatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 683-84 (1983). Because of the difficulties encountered by black lung claimants in gaining benefits under the 1969 Act, Congress found that the 1969 Act had not benefited "countless miners and their survivors who were the intended beneficiaries of the Black Lung program." Senate Rep. No. 92-743, 92d Cong., 2d Sess., *reprinted in* 1972 U. S. Code and Cong. & Admin. News 2305, 2307. Thus, in 1972, before the effective date of Part C, Congress amended the 1969 Act. Pub. L. No. 92-303, 86 Stat. 153 (1972) (codified at 30 U.S.C. §§ 901-41 (1976)). The 1972 amendments extended the filing deadline under Part B to June 30, 1973, and delayed the effective date of Part C until January 1, 1974. 30 U.S.C. § 925 (1982).[4] The amendment also created an additional rebuttable presumption of pneumoconiosis for a miner without a positive x-ray. The presumption applied if the miner had fifteen years of underground coal mine employment and other evidence of a totally disabling pulmonary or respiratory impairment. 30 U.S.C. § 921(c)(4) (1982).

Finally, in order to redress the problem of excessive denials of past claims, the 1972 amendments required the Secretary of Health, Education and Welfare to reopen and review pending and

4. Claims filed between June 30, 1973, and January 1, 1974, were covered by 30 U.S.C. § 925.

denied claims under the new standards created by the 1972 amendments.[5] These reopened and pending claims were to be evaluated under new "interim" regulations, 20 C.F.R. § 410.490, the same regulations which this Court ultimately considered in *Coughlan*. The purpose of the regulations was to "permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments." 20 C.F.R. § 410.490(a). Under section 410.490, a miner's disability would be presumed to be due to pneumoconiosis if he or she submitted a positive x-ray and proved the disability arose out of coal mine employment. § 410.490(b).[6]

Once implemented, the "interim" regulations boosted significantly the number of approvals of Part B claims. J. S. Lopatte, *The Federal Black Lung Program: a 1983 Primer*, 85 W. Va. L. Rev. 677, 686 (1983).

Claims filed after January 1, 1974, under Part C, however, encountered obstacles to approval. Because no state black lung

5. 30 U.S.C. § 941 (1976) (amended 1977) states:

> The Secretary of Health, Education, and Welfare shall, upon enactment of the Black Lung Benefits Act of 1972, generally disseminate to all persons who filed claims under this subchapter prior to May 19, 1972, the changes in the law created by such Act, and forthwith advise all persons whose claims have been denied for any reason or whose claims are pending, that their claims will be reviewed with respect to the provisions of the Black Lung Benefits Act of 1972.

6. The presumption in 20 C.F.R. § 410.490(b) in pertinent part provides:

> (b) **Interim presumption.** With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:
>
> (1) One of the following medical requirements is met:
>
> (i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis * * * [.]
>
> * * * *
>
> (2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

programs had been federally approved by 1973, *id.* at 688, the Department of Labor undertook full supervision of the black lung program under Part C. The regulations used by the Department of Labor, 20 C.F.R. §§ 410.101-.476 (1986), proved to be much more restrictive than the interim regulations, and, hence, the approval rate slackened considerably.[7]

Congress again became dissatisfied with the low approval rate, this time under 20 C.F.R. §§ 410.101-.476, and in 1977, passed the Black Lung Benefits Reform Act of 1977. Pub. L. No. 95-239, 92 Stat. 95.[8] The purpose of the 1977 amendments was the same as the 1972 amendments: to expand the coverage of the original act and to lessen restrictions on eligibility. *See, e.g., Underhill* v. *Peabody Coal Co.*, 687 F.2d 217, 220 (7th Cir. 1982).

In the 1977 amendments, Congress specifically instructed the Secretary to adopt regulations with "criteria" no more restrictive than those in 20 C.F.R. § 410.490 and to apply them to all Parts B and C claims, including those pending or *denied* as of March 1, 1978, 30 U.S.C. § 945(b) (1982), as well as those Part C claims filed before April 1, 1980. 30 U.S.C. § 902(f)(2) (1982); *see also* H. R. Rep. No. 95-151, 95th Cong. 2d Sess. 25, 49, *reprinted in* 1978 U. S. Code Cong. & Admin. News, 237, 261, 284 (interpreting Section 12 of Black Lung Benefits Reform Act of 1977); House Conf. Rep. No. 95-864, 95th Cong., 2d Sess. 20, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 308, 314. Thus, Congress once more instructed the Department of Labor to reassess past denials under a more liberal standard of disability.[9]

7. Of the 128,000 Part C claims considered by the Department of Labor prior to March, 1978, only about half were processed. Of the processed claims, 68,100 were denied and 5,000 approved. *Id.* at 691 (citing *House Comm. on Ways and Means, Subcomm. on Oversight*, 97th Cong., 1st Sess., 13 (1981) Print No. 97-14).

8. Congress also passed the Black Lung Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 111, which created the Black Lung Disability Trust Fund. The Trust Fund raised money through an excise tax on the sale of coal to pay benefits where the coal mine operator(s) who employed the miner could not be found. 30 U.S.C. § 934.

9. Congress also instructed the Department of Health, Education and Welfare (now the Department of Health and Human Services) to notify Part B claimants that they had a right to have their pending or denied claim reconsidered under the 1977 amendments. 30 U.S.C. § 945(a)(1). Part B claimants had the option of having: (1) the Secretary of Health, Education and Welfare review the claim based on evidence already in the record "taking into account" the 1977 amendments, § 945(a)(1)(A), and if the claim was denied, it would be transferred to the Department of Labor for review with the opportunity to submit additional evidence, § 945(a)(2)(B); or (2) the claimant could elect to have the claim transferred directly to the Department of Labor with the opportunity to submit additional evidence, § 945(a)(1)(B). If the claimant chose to have the Department of Health, Education and Welfare review the claim, and it approved the claim, the Department would transfer the claim to the Department of Labor with "an initial determination of eligibility" directing that the Department of Labor provide payment of benefits in accordance with Part C. § 945(a)(2)(A).

Since the Department of Health and Human Services is not a party to this suit, we have restricted our analysis to the role of the Department of Labor.

After passage of the 1977 amendments, the Department of Labor adopted 20 C.F.R. Part 727 (1986). It was under these regulations that the Secretary of Labor was to review all claims filed before April 1, 1980, including those pending or denied as of the 1977 amendments.

As we observed in *Coughlan*, however, Part 727 did not provide "criteria" for determining disability under the BLBA, which were no more restrictive than those in the interim regulations contained in section 410.490. Section 410.490(b)(1)(i) presumed total disability due to pneumoconiosis upon showing of a positive x-ray and evidence that the impairment arose out of coal mine employment. Section 727.203(a)(1), on the other hand, required a miner to have worked ten years before a positive x-ray would be sufficient to invoke the presumption.[10] *Coughlan* eventually overturned this improper regulation. It did not, however,

10. The pertinent part of section 727.203 reads:

> (a) **Establishing interim presumption.** A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconisosis, arising out of that employment, if one of the following medical requirements is met:
>
> (1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title)[.]

determine the fate of those claimants who had been denied benefits under the improper standard from March 1, 1978, to March 27, 1985, when *Coughlan* was decided.

Are the rights of the claimants which were violated sufficiently substantial or are the violations sufficiently patent to justify the invocation of mandamus jurisdiction? From the legislative history of the BLBA, it is clear that Congress has consistently demonstrated a deep concern for the plight of black lung benefits claimants. Congress reopened black lung claims in 1972 and 1977 in order that deserving claimants could more easily obtain benefits. In doing so, Congress overrode the BLBA procedures by specifically requiring the Department of Labor to review not only pending claims but also those claims that had been denied and to do so without regard to the thirty or sixty-day period of limitations in the BLBA. *See* 30 U.S.C. § 932 (1982). By reopening black lung claims twice and requiring adjudication under more liberal standards, Congress demonstrated that it considered the rights involved in those claims to be substantial. Therefore, with respect to those claims pending or denied as of the effective date of the 1977 amendments, March 1, 1978, Congress has indicated that those rights are substantial.

Similarly, those who filed their claims between March 1, 1978, and April 1, 1980, have substantial rights at stake. As previously mentioned, Congress has stated that all claims filed between March 1, 1978, and April 1, 1980, should be treated under the same standard as those pending or denied as of the 1977 amendments. *See* 30 U.S.C § 902(f)(2)(C). It should not be necessary for Congress to pass a third act requiring the Secretary to reconsider these claims under the proper standard.

In order for the district court to exercise mandamus jurisdiction, the agency over which jurisdiction is being exercised must also owe a clear nondiscretionary duty to act. *Heckler* v. *Ringer*, 466 U.S. at 616-17. The Secretary argues that no such duty is owed here. According to the Secretary, neither *Coughlan* nor the BLBA requires the Secretary to review *sua sponte* the denied claims of the claimants here.

The Secretary, while correct in his interpretation of *Coughlan*, ignores the duty created by the 1977 amendments to the BLBA. These amendments *inter alia* require that all pending or denied Parts B and C claims be reviewed under criteria no more restrictive than those contained in the interim regulation, section 410.490. They also require that all future claims be adjudicated under that same standard.

With respect to the claimants here who had claims pending or denied as of the 1977 amendments, Congress explicitly stated that the Secretary owed a duty to reopen their claims and review them under the new standard in the 1977 Amendments. The Secretary did not fulfill this obligation imposed on him by Congress. Even if review of those claims did occur, the Secretary did not do so under the proper standard. Therefore, the Secretary still owes this duty to these claimants.

As to the claims filed between the effective date of the 1977 amendments, March 1, 1978, and April 1, 1980, Congress has stated that these claims should be judged under the same standard. *See* 30 U.S.C. § 902(f)(2) (1982). The Secretary therefore owes the same duty to these claimants to reopen and consider their claims under section 410.490.[11]

II. EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Besides arguing that the BLBA excludes the district court from exercising jurisdiction over the Department of Labor, the Secretary also contends that no court can review the appellants' or any "class" members' claims until they have exhausted their administrative remedies.

Before discussing this issue, we must clarify what claims of the appellants and the "class" are at issue. As stated in Section I, the district court could not properly exercise mandamus jurisdiction and determine *the validity* of the "class" members' claims for

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11. Because we hold the district court has jurisdiction under 28 U.S.C. § 1361, we do not consider appellant's claim that this court has mandamus jurisdiction under 28 U.S.C. § 1651.

benefits. The duty which the district court could require the Secretary to perform is a reopening of claims wrongfully denied under section 727.203(a) so that they could be considered under section 410.490. Once the Secretary has reopened the claims, the appellants and the "class" members must exhaust their administrative remedies with regard to their substantive claims. This Court therefore need only decide whether the "class" members must exhaust their administrative remedies in seeking to have their claims reopened and considered under section 410.490.[12]

The Supreme Court has adopted a pragmatic approach to statutory finality requirements. *Bowen* v. *City of New York*, U.S. , 90 L.Ed.2d 462, 477-78 (1986). *See also Polaski* v. *Heckler*, 751 F.2d 943, 951 (8th Cir. 1984) (citing *Mental Health Ass'n of Minnesota* v. *Heckler*, 720 F.2d 965, 969 (8th Cir. 1983)), *vacated and remanded*, U.S. , 90 L.Ed.2d 974 (1986), *reinstated*, 804 F.2d 456. In *Mathews* v. *Eldridge*, 424 U.S. 319, 330 (1976), the Court held that waiver of the exhaustion requirement is appropriate "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate."

The circumstances of this case reveal that deference to the agency is not appropriate. Although the Department of Labor has agreed to follow *Coughlan* in all cases still pending in the Eighth Circuit after the date of that decision, the agency refuses to reopen claims adjudicated prior to *Coughlan* where the claimant failed either to appeal to the BRB within thirty days after an initial determination or within sixty days to the court of appeals after a final agency decision. Further consideration of this issue by the Department of Labor will not in any way clarify or alter the agency's position. *See Mental Health Ass'n of Minnesota*, 720 F.2d at 970. Furthermore, this is not a case where agency expertise is needed to resolve the legal issue. *See Southern Ohio*

12. As noted in the previous section, the Secretary has agreed to follow *Coughlan* in all claims now pending in the Eighth Circuit. We construe this agreement to apply to pending claims in which the *Coughlan* issue was not specifically raised but is present.

Coal Co. v. *Donovan*, 774 F.2d 693, 702 (6th Cir. 1985) (certain procedures of the Federal Mine Safety and Health Review Commission held unconstitutional; coal mine operator's failure to exhaust administrative remedies not preclusive of judicial review). The matter involved is strictly legal: whether the Department of Labor owes a statutory duty to the "class" members to reopen their claims. We believe it does. Therefore, the "class" members do not have to exhaust their administrative remedies with regard to the issue of the reopening of their claims.

III. PERIOD OF LIMITATIONS.

The Secretary argues that even if he owes a clear substantive duty, a writ of mandamus cannot issue because the claims of "class" members may be procedurally barred by their failure to take timely administrative or judicial appeals from the denials of their claims under the BLBA. Thus, according to the Secretary, the Department of Labor is without jurisdiction to reopen such claims, and this Court is without jurisdiction to hear this appeal.

The statutory review scheme in the BLBA, as devised by the 1972 amendments, provides that a compensation order by an administrative law judge must be appealed within thirty days of issuance to the BRB. 30 U.S.C. § 932(a) (1982) (incorporating 33 U.S.C. § 921(a) (1982) of the Longshore and Harbor Workers' Compensation Act). Decisions of the BRB must be appealed to the circuit courts of appeals within sixty days. *Id.* (incorporating 33 U.S.C. § 921(c) (1982) of the Longshore and Harbor Workers' Compensation Act).

We hold that despite these administrative and judicial appeals limitations, the Department of Labor has jurisdiction to reopen the claims of the "class" members whose claims were wrongfully denied under 20 C.F.R. § 727.203(a), although the denials may not have been timely appealed.

As discussed in Section I, the Secretary continues to owe a duty to all "class" members whose claims were not properly reopened and adjudicated according to the eligibility standard recognized in *Coughlan*. That duty arises for all claims pending or denied as

of the 1977 amendments from 30 U.S.C. § 945 of the BLBA in which Congress, by implication, waived the thirty and sixty-day deadlines for appeals of those claims under the BLBA.

Clearly Congress had the authority to waive the limitation created by the deadlines. Because the appeals deadlines are creatures of legislation, Congress could change or disregard the deadlines regardless of whether the deadlines are considered jurisdictional. While any disregard or lengthening of the thirty or sixty-day periods must be strictly construed as an extension of a waiver on sovereign immunity, *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983), a court cannot restrict the waiver more severely than Congress intended. *Bowen* v. *City of New York*, U.S. , 90 L.Ed.2d at 474 (citing *Block*, 461 U.S. at 287).

In addition, section 945(b)(1) states that review by the Secretary of Labor of those claims should "tak[e] into account the amendments made to this part by the Black Lung Benefits Reform Act of 1977." The Secretary has yet to take properly "into account" the 1977 amendments. Therefore, the Secretary continues to have this obligation to reopen these claims under the *proper standard* as recognized in *Coughlan*.

In regard to those claims filed between March 1, 1978, and April 1, 1980, Congress also stated in section 902(f)(2)(c) that the Secretary of Labor should not apply criteria more restrictive than those contained in 20 C.F.R. § 410.490. Thus, although Congress never directed that these claims be reopened, Congress did instruct that these claims be adjudicated under the same standard as those pending or reopened under the 1977 amendments. It would therefore be contrary to congressional intent to allow claims pending or denied as of March 1, 1978, to be treated under a different standard than claims filed between March 1, 1978, and April 1, 1980. Therefore, any claims filed between March 1, 1978, and April 1, 1980, which were subsequently denied should be reopened along with those claims pending or denied as of March 1, 1978.

The Secretary also contends that the thirty- and sixty-day periods of limitation in 33 U.S.C. § 921(a) and (c) are jurisdictionally based and limit the district court's mandamus jurisdiction.[13] We disagree. We find no grounds for concluding that these periods of limitations affect the district court's mandamus jurisdiction. *See Ellis* v. *Blum*, 643 F.2d 68, 78-82 (2d Cir. 1981) (determining that 42 U.S.C. § 405(h) of the Social Security Act does not completely prohibit mandamus jurisdiction in the district courts to review agency action).

The periods of limitation in 33 U.S.C. § 921(a) and (c) exist within the BLBA's specific statutory review scheme and become largely unmeaningful for actions based on jurisdictional grants outside of the BLBA, such as mandamus under section 1361. *See City of New York* v. *Heckler*, 742 F.2d 729, 739 n.7 (2d Cir. 1984) (mandamus jurisdiction of district court in social security action unaffected by sixty-day period of limitations in 42 U.S.C. § 405(g)), *aff'd on other grounds, City of New York*, U.S. , 90 L.Ed.2d at 462. Specifically, neither the thirty-day limitation on administrative appeals nor the sixty-day limitation on appeals to the circuit courts contemplates a claim before the district

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13. As the Secretary observes, three Circuits have held the thirty-day administrative appeal period to be jurisdictionally based. *See Insurance Co. of North America* v. *Gee*, 702 F.2d 411 (2d Cir. 1983); *Wellman* v. *Director, Office of Workers' Compensation*, 706 F.2d 191 (6th Cir. 1983); *Bennett* v. *Director, Office of Workers' Compensation*, 717 F.2d 1167 (7th Cir. 1983). And, four Circuits, including this Circuit, have held that the sixty-day judicial appeal period is jurisdictional. *Clay* v. *Director, Office of Workers' Compensation*, 748 F.2d 501 (8th Cir. 1984); *Pittson Stevedoring Corp.* v. *Dellaventura*, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom., Northwest Marine Terminal* v. *Caputo*, 432 U.S. 249 (1977); *Midland Ins. Co.* v. *Adam*, 781 F.2d 526 (6th Cir. 1985); *Arch Mineral Corp.* v. *Office of Workers' Compensation Programs*, 798 F.2d 215 (7th Cir. 1986).

The nature of the periods of limitations in 33 U.S.C. § 921(a) and (c), however, may have to be reevaluated in light of *Bowen* v. *City of New York*, U.S. , 90 L.Ed.2d at 462. In *City of New York*, a class sued the Social Security Administration arguing that an unlawful unpublished policy of the Administration caused deserving claimants to be denied benefits. U.S. , 90 L.Ed.2d at 470. Many members of the class had not appealed their denials within sixty days. The Court found that the sixty-day requirement in 42 U.S.C. § 405(g) was not a jurisdictional bar to review by the federal courts.

court.[14] Therefore, once it has been determined, as it was in Sections I and II, that the BLBA permits, in limited circumstances, the exercise of mandamus jurisdiction by the district court and that the circumstances of this case fit within those limitations, the periods of limitations contained in the BLBA cannot be considered a further limitation on the mandamus jurisdiction of the district court.

IV. CONCLUSION.

On remand, the district court should certify a class consisting of those persons who (1) have filed claims for benefits under the BLBA between December 30, 1969, and April 1, 1980; (2) have claimed a disability due to pneumoconiosis caused by employment in the coal mining industry; (3) have submitted a positive x-ray as proof of the presence of pneumoconiosis; (4) have been denied the benefit of the presumption of pneumoconiosis contained in 20 C.F.R. § 727.203(a)(1) because they did not prove that they had worked ten years in the coal mines; (5) were not afforded the opportunity to submit a claim under 20 C.F.R. § 410.490; and (6) do not have claims under 20 C.F.R. § 410.490 or 20 C.F.R. § 727.203(a)(1) currently pending before the Department of Labor. We emphasize that the Secretary is to consider each claim individually and that appeals from these decisions will be made in accordance with the review scheme of the BLBA.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

14. 33 U.S.C. § 918 grants jurisdiction to the district court for the limited purpose of collecting defaulted compensation payments. This provision is irrelevant to this dispute.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315SI James Sebben, et al., *Appellants,* vs. William E. Brock, III, etc., et al., *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

Appellees' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

June 25, 1987

Order entered at the Direction of the Court:

/s/ Michael E. Gans, Chief Deputy

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315SI James Sebben, et al, *Appellants,* vs. William E. Brock, III, etc., et al. *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

The petition for rehearing with suggestion for rehearing en banc submitted by movants to intervene, Pittston Coal Group, et al, is denied.

July 24, 1987

Order entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315SI John Sebben, et al., *Appellants,* vs. William E. Brock, III, etc., et al., *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

It is ordered by the Court that motion filed by Old Republic Insurance Company, et al, for leave to intervene and file petition for rehearing be granted.

And it is further ordered that Old Republic Insurance Company, et al., be granted an extension until May 8, 1987, in which to file the petition for rehearing.

May 8, 1987

Order entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-1295 In Re: James Sebben, John Cossolotto, Bruno Lenzini, Charles Tonelli, on behalf of themselves and all others similarly situated, *Petitioners.*	Petition for Writ of Mandamus.
No. 86-1315SI James Sebben, et al., *Appellants,* vs. William E. Brock, III, etc., et al., *Appellees.*	Appeal from the United States District Court for the Southern District of Iowa.

It is ordered by the Court that the following motions be granted:

1. Motion of Pennsylvania National Insurance Group and Barnes and Tucker Company for leave to intervene; and
2. Motion for leave to file brief of amicus curiae on behalf of the National Council on Compensation Insurance.

May 26, 1987

Order entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAMES SEBBEN, et al., *Plaintiffs,* vs. WILLIAM E. BROCK, III, et al., *Defendants.*	Civil No. 85-589-A RULING ON MOTION TO DISMISS

This case comes before the Court on defendants' motion to dismiss for lack of subject matter jurisdiction. A hearing on the motion was held on January 30, 1986. Appearances are noted in the clerk's minutes for that date.

Under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45, a coal miner is entitled to disability benefits if he is totally disabled by pneumoconiosis arising out of his coal mine employment. A presumption of total disability arises from evidence of a chest x-ray establishing the existence of pneumoconiosis. 20 C.F.R. § 410.490(b)(1)(i). In *Coughlan* v. *Director, Officer of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), the court held that this presumption is available in cases covered by a 1977 amendment to the Act.

Plaintiffs are unsuccessful Black Lung benefits applicants who contend that they were erroneously denied the presumption of total disability recently recognized in *Coughlan*. They seek a writ of mandamus directing defendants to review past applications under the Act to identify applicants who should have received the benefit of the presumption.

Plaintiffs rest their claim for jurisdiction in this Court on 28 U.S.C. § 1361, which reads in its entirety: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

This statute has been construed to authorize district court intervention if an officer is acting without authority, contrary to a clear duty, or in clear abuse of his discretion. Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 3655; see *Miller* v. *Ackerman*, 488 F.2d 920 (8th Cir. 1973) (official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted).

In the case at hand, plaintiffs assert that defendants had a duty to apply the presumption of § 410.490(b), but failed to do so. As a result, plaintiffs argue, defendants now have a duty to reconsider past applications. While *Coughlan* supports the premises to plaintiffs' syllogism, the conclusion does not necessarily follow. The opinion in *Coughlan* is silent with regard to whether its holding should be retroactively applied, and the Court knows of no other source for the duty advanced by plaintiffs. Accordingly, it would not be proper for the Court to exercise mandamus jurisdiction.

There is a second, more fundamental, reason for this Court to decline jurisdiction. Congress has conferred upon the circuit courts of appeal sole and exclusive jurisdiction to review administrative action under the Black Lung Benefits Act.[1] E.G., *Louisville and Nashville Railroad Co.* v. *Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983). Thus, the proper procedure for contesting defendants' action or inaction is to exhaust the administrative remedies provided under the statute and then to seek review, if desired, in the court of appeals, rather than to pursue a writ of mandamus in this Court.

The Court recognizes that requirements of finality and formality impose obstacles that in rare instances might preclude statutory court of appeals review of agency actions. See Wright, Miller & Cooper, *Federal Practice and Procedure:* Jurisdiction 2d § 3943. Under such circumstances, an argument can be made that Congress did not intend to forbid the district courts from

1. The Act allows for district court jurisdiction in only two very narrow situations involving enforcement of compensation orders.

taking jurisdiction. "Generally, however, when Congress has specified a procedure for judicial review of administrative action, courts will not make nonstatutory remedies available without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily-prescribed method of review . . . ." *Louisville and Nashville Railroad Co.* v. *Donovan*, 713 F.2d 1243, 1247 (6th Cir. 1983), quoting *Nader* v. *Volpe*, 466 F.2d 261, 265-66 (D.C. Cir. 1972). Here, as indicated earlier, plaintiffs have not made the required showing. If plaintiffs are, in fact, precluded from obtaining statutory court of appeals review, perhaps resort may be had to the All Writs Act, 28 U.S.C. § 1651, which empowers courts of appeals to "issue all writs necessary or appropriate in aid of their respective jurisdictions . . . ." In light of the clear Congressional preference for circuit court review of matters pertaining to the Black Lung Benefits Act, and in further view of the circuit courts' expertise in these matters, such an approach should be favored over mandamus relief by this Court.

IT IS THEREFORE ORDERED that defendants' motion to dismiss plaintiffs' action is hereby granted.

Signed this 6 day of February, 1986.

/s/ W.C. STUART

W.C. STUART, JUDGE
SOUTHERN DISTRICT OF
IOWA.

SUPREME COURT OF THE UNITED STATES
No. A-219

PITTSTON COAL GROUP, ET AL.,

Applicants,

v.

JAMES SEBBEN, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 20, 1987.

/s/ Harry A. Blackmun

Associate Justice of the Supreme
Court of the United States

Dated this 17th
day of September, 1987.

U.S. CONST.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

30 U.S.C. § 902(f)

§ 902. Definitions

For purposes of this subchapter—

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) Such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

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30 U.S.C. § 932(a)

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§ 932. Failure to meet workmen's compensation requirements

(a) Benefits; applicability of Longshore and Harbor Workers' Compensation Act; promulgation of regulations

Subject to section 28(h)(1) of the Longshore and Harbor Workers' Compensation Act Amendments of 1984, during any period after December 31, 1973, in which a State workmen's compensation law is not included on the list published by the Secretary under section 931(b) of this title, the provisions of Public Law 803, 69th Congress (44 Stat. 1424, approved March 4, 1927) as amended [33 U.S.C.A. § 901 et seq.], as it may be amended from time to time (other than the provisions contained in sections 1, 2, 3, 4, 8, 9, 10, 12, 13, 29, 30, 31, 32, 33, 37, 38, 41, 43, 44, 45, 46, 47, 48, 49, 50, and 51 thereof) [33 U.S.C.A. §§ 901, 902, 903, 904, 908, 909, 910, 912, 913, 929, 930, 931, 932, 933, 937, 938, 941, 943, 944, 945, 946, 947, 948, 948a, 949, 950], shall (except as otherwise provided in this subsection or by regulations of the Secretary and except that references in such Act to the employer shall be considered to refer to the trustees of the fund, as the Secretary considers appropriate and as is consistent with the provisions of section 9501(d) of Title 26), be applicable to each operator of a coal mine in such State with respect to death or total disability due to pneumoconiosis arising out of

employment in such mine, or with respect to entitlements established in paragraph (5) of section 921(c) of this title. In administering this part, the Secretary is authorized to prescribe in the Federal Register such additional provisions, not inconsistent with those specifically excluded by this subsection, as he deems necessary to provide for the payment of benefits by such operator to persons entitled thereto as provided in this part and thereafter those provisions shall be applicable to such operator.

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33 U.S.C. § 919

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§ 919. Procedure in respect of claims

(a) Filing of claim

Subject to the provisions of section 913 of this title a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Notice of claim

Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) Investigations; order for hearing; notice; rejection or award

The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the

claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b) of this section, the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) Provisions governing conduct of hearing; administrative law judges

Notwithstanding any other provisions of this chapter, any hearing held under this chapter shall be conducted in accordance with the provisions of section 554 of Title 5. Any such hearing shall be conducted by a[1] administrative law judge qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this chapter, on October 27, 1972, in the deputy commissioners with respect to such hearings shall be vested in such administrative law judges.

(e) Filing and mailing of order rejecting claim or making award

The order rejecting the claim or making the award (referred to in this chapter as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

(f) Awards after death of employee

An award of compensation for disability may be made after the death of an injured employee.

(g) Transfer of case

At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of

1. So in original. Probably should be "an".

making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) Physical examination of injured employee

An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

33 U.S.C. § 921

§ 921. Review of compensation orders

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of five members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. The Chairman shall have

the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.

(2) For the purpose of carrying out its functions under this chapter, three members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least three members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to

conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District Court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the

order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

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20 C.F.R. § 410.490

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§ 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease

and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) as demonstrated by values

which are equal to or less than the values specified in the following table:

	Equal to or less than —	
	FEV_1	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than —	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

May 25, 1978

Robert B. Dorsey
Chief, Branch of Claims Determination
Division of Coal Mine Workers' Compensation
Office of Workers' Compensation Programs
Employment Standards Administration
Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Dear Mr. Dorsey:

The following memorandum and appendix constitute the written comments of the Members of the House Committee on Education and Labor on Parts 727 and 725 of the proposed Black Lung Regulations.

We wish to thank the Department for the opportunity to offer comments on these regulations, and hope that our suggestions will prove helpful to you.

Sincerely,

.....	.....
/S/ CARL D. PERKINS	/S/ JOHN H. DENT
.....	
/S/ PAUL SIMON	

Introduction

In consideration of the enactment of the Black Lung Benefits Revenue Act of 1977 ("Revenue Act"), and the Black Lung Benefits Reform Act of 1977 ("Reform Act"), the Department of Labor ("Labor", "DOL") promulgated a new set of proposed regulations,[1] which act to implement the changes made by these pieces of legislation in the Federal Mine Safety and Health Act of 1977 (the "Act"). The proposed regulations possess many positive features, that, when considered in their totality, go far to carrying out the recent reforms made by Congress in the Black Lung statutory scheme. Among other things, these rules clarify and expand the definitions of pneumoconiosis and miner, liberalize evidentiary and eligibility standards, establish a workable framework for the operation of the Black Lung Disability Trust Fund and attempt to streamline the procedure that an individual must follow in the presentation of his claim. Though in many instances the proposed regulations do not contain the degrees of liberality and flexibility that the Members of the Committee would have favored, we are mindful of the fact that the Department must try to be even-handed and open-minded in fashioning a regulatory structure that will be equitable to all the parties at interest. The laudatory effort undertaken by the Department to reach this goal must be generally applauded, for a review of these rules clearly indicates that DOL sincerely engaged in a good faith effort to accommodate the conflicting interests of claimant and operator, and to follow the legislative intent of Congress.

However, the Committee must take strong exception to a number of procedural changes made by these regulations.[2] It is the Committee's fervent belief that the procedural rules discussed below would, if left unchanged, severely impact upon the ability of a claimant to adequately present his case before the Department. Therefore, the Members of this Committee must respectfully, but emphatically, urge that DOL reconsider the proposed rules noted below and move to amend these regulations

1. [Footnotes not accessible.]

in accordance with the suggestions of the Committee. Before embarking upon a discussion of the general procedural aspects of the regulations, as found in Part 725, these comments will first focus on Part 727, that part of the proposed regulations which establishes the specific procedures for the processing of pending and denied claims brought pursuant to Section 435 of the Act.

Part 727

This part, like Part 725, contains many favorable provisions indicative of DOL's efforts to implement the Congressional intent behind this new Black Lung legislation, as well as a handful of other provisions which could create unnecessary difficulties for a claimant seeking relief. More specifically, the Committee strongly supports the re-promulgation of the interim standards, as found in Section 727.203(a). Furthermore, the decision of the Department to increase the blood gas standards by five points over that found in the present interim standards[3] is especially noteworthy, though it must be stated that the Committee believes that present medical evidence justifies raising the standards at least another five points. In addition, the Department's efforts to provide a mechanism for the expedited review of claims pending before an administrative law judge ("ALJ") (*See* Section 727.405(a)) deserves praise, though it would be preferable to give the claimant the option to choose between either having his claim heard before an ALJ or having the claim sent back to the deputy commissioner for expedited review. However, some of the proposed regulations contained within this part should be changed to make the procedure more efficient and to afford a claimant more equitable treatment than he would receive under these rules.

The first serious difficulty with these rules arises in Section 727.105, which concerns the course of action DOL will take once a claim has been certified for approval by the Social Security Administration ("SSA"). In comparing paragraph (a) with paragraph (b) of this provision, it will be noted that the Department provided for immediate payment of the basic benefit

to a certified SSA claimant *only* if a responsible operator cannot be identified or if a claimant's mining employment terminated prior to January 1, 1970; in the instances in which a responsible operator is identified, the regulation makes *no* provision for immediate payment, but instead forces the claimant to carry his claim through the entire DOL Black Lung adjudication machinery before he would receive any payment—even though his claim had been previously certified by SSA. *See* §727.105(b)(4) & (5). Such a proposition is directly contrary to the express intent of Congress, for both the statute and the legislative history make abundantly clear that once SSA certified a claimant eligible to receive payment, the Secretary of Labor "shall immediately make or otherwise provide for the payment of the claim ...." *See* Section 435(a)(2)(A) of the Act. The Joint Explanatory Statement of the Conference Committee, as well as the remarks of Senator Randolph and Congressman Perkins during the course of debate on the Reform Act, heavily underline the fact that it is the duty of the Secretary of Labor to make immediate and full payment to SSA certified claimants.[4] Nowhere in the statute, in the Joint Explanatory Statement nor in the floor debate was there any indication that Congress sought to distinguish SSA certified claims on the basis of whether DOL could find a responsible operator. *All* claimants certified by the Social Security Administration as eligible to receive benefits are to receive payment immediately and in full from the Secretary of Labor, once DOL receives the claimant's file. Paragraph (b) should therefore be significantly altered to reflect the clear and unambiguous intent of Congress on this score. The failure of the Department to do so up to now clearly contravenes the express intent of Congress, and so should be rectified.[4^]

The Committee must also take exception, in part, to the Department's definition of pneumoconiosis set out in Section 727.202. The last sentence of this section provides that pneumoconiosis "does not include cancer or any disease of bacteriological or viral origin." Whether cancer or an infection or "any disease" are caused or hastened by the inhalation of coal

dust is a matter of fact to be established in each case. The present state of medical knowledge is not sufficient to exclude the possibility that cancer or a disease may have been caused by the inhalation of coal dust.

Certain language in Part 727 also acts to raise questions as to how the Department actually intends to treat the x-ray evidence of a Section 435 claimant. In Section 727.203(a)(1), DOL follows the exact wording of the interim standards covering x-ray evidence-that an x-ray alone can establish the presence of pneumoconiosis.[5] However, Section 727.206(b) of the proposed rules states that in "all claims where there is other evidence of a pulmonary or respiratory impairment a board-certified or board-eligible radiologist's interpretation of a chest x-ray shall be accepted by the Office if the x-ray is in compliance with ... §410.428(b) ...." Though this statement follows the prescription contained in Section 413(b) of the Act, it should be emphasized that Section 413(b) was not meant to impose upon a Section 435 claimant a more rigorous burden than that found in the interim standards. If a miner-claimant has been engaged in coal mine employment for 10 years and presents an x-ray establishing the presence of pneumoconiosis which meets the quality standards of 20 CFR §410.428, he may invoke the interim presumption found in Section 727.203(a)(1). There is no need for such a claimant to have "other evidence of a pulmonary or respiratory impairment" if his x-ray establishes the presence of pneumoconiosis. Paragraph (b) should be altered to reflect the fact that an x-ray in compliance with the requirement of §410.428(b) which establishes the presence of pneumoconiosis shall be sufficient to satisfy the interim presumption.

Further difficulties present themselves in subparagraph (b)(1) of this Section. This provision holds that nothing in this section "shall preclude the consideration of any other relevant evidence including other x-rays and x-ray interpretations in determining the presence or absence of pneumoconiosis." If "other relevant evidence" is meant to include the subsequent interpretative analyses of x-rays undertaken by radiologists consulted or

employed by the government, then this provision is in error. Both the House and Senate reports on the Reform Act criticized the government for imposing a panel of "second guessers," and sought to limit government review only to objective determinations of quality.[6] If this subparagraph is retained in any form, it should expressly state that the government's review of x-rays shall be limited to only the issue of objective determination of quality, and that the government's review of x-rays shall not be concerned with whether an x-ray establishes the presence of pneumoconiosis. This subparagraph should make clear that interpretations by government consulted or employed radiologists of a party's x-rays taken by board certified or board eligible radiologists on subjects other than the objective determination of an x-ray's quality shall not be considered admissible as evidence. To allow the introduction into evidence of government interpretations on other matters would directly contradict the legislative intent of the Congress on the use of x-rays in a claimant's case.

The Committee must also express its concern over the additional language added by DOL to Section 727.302. Its counterpart under the old regulations, 20 C.F.R. §725.503, did not contain this language. Both sections relate to the subject of fixing a date from which benefits are payable after review and approval, and both provide that benefits shall be payable to eligible beneficiaries beginning with the month of onset of total disability. *Compare* 20 C.F.R. §725.503(a) *with* Section 727.302(c)(1), (d)(1). However, Section 727.302 adds a new sentence to subparagraphs (c)(1) and (d)(1), which provides that where the evidence does not establish the month of onset, benefits shall be payable from the month during which the miner elected review. It must be stated that there exists a strong fear that this sentence will serve as the instrument by which the Department will proceed to deny retroactive relief to successful claimants. Furthermore, a number of parties in the field and in the federal bureaucracies expressed the opinion that though the month of onset may not be able to be determined with exact

certainty, nearly all benefit programs including Social Security and workmen's compensation, manage to establish a month of onset. Moreover, it seems curious that for almost five years the Department did not by regulation employ such an expedient and explicit cutoff device, yet reported no previous difficulties with the prior practice of determining the month of onset of total disability. In order to placate the fears of many individuals in the Congress and in the field, and to encourage the reviewing officials to exercise the utmost diligence in their efforts to establish a month of onset, the Committee believes that the Department should emphasize in these paragraphs that resort to the back pay cutoff device should not be had until the reviewing official is certain that a month of onset cannot be established.

A final comment on Part 727 involves Section 727.402, the provision covering the adjudication of claims pending in the office of Administrative Law Judges. As mentioned previously, the Committee applauds the effort of the Department to provide for expedited review of these claims, once they are remanded to the Deputy Commissioner's Office. See 727.405. It would still be preferable, though, for the individual whose claim is pending before an ALJ to be given the option of either having that claim decided by the ALJ or allowing the claim to be returned to the Deputy Commissioner for expedited review. At present, the proposed regulations grant the Director of the Office of Workmen's Compensation Programs ("OWCP") the power to obtain the remand of an individual's claim pending before an ALJ to the Deputy Commissioner's Office. *See* 727.402(b). Paragraph (e) of this section additionally allows for the immediate remand of a claim to the commissioner's office, if that claim has been denied by an ALJ. Again, the claimant should have the option of either pursuing his claim on appeal to the Benefits Review Board ("BRB"), or returning to the Deputy Commissioner's office for further consideration of his claim.